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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE GONZALEZ SANCHEZ, Defendant and Appellant.	H040343 (Santa Cruz County Superior Ct. No. F17818)

At his first jury trial, defendant Jose Gonzalez Sanchez was convicted of carrying a concealed firearm in a vehicle (former Pen. Code, § 12025, subd. (a)(1))[1] and bringing a controlled substance into a jail (§ 4573). The jury also found true an uncharged variant of a punishment allegation under former section 12025, subdivision (b)(6) (the subdivision (b)(6) allegation) that was attached to the firearm count and qualified that count to be treated as a wobbler rather than as a misdemeanor. There are three ways to prove one of the two elements of a subdivision (b)(6) allegation. Two of the three ways (which we will call variants) were charged; the jury found true the third variant. Defendant was sentenced to seven years and four months in state prison.

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[1] Subsequent statutory references are to the Penal Code.

In defendant's first appeal, this court reversed the judgment due to the erroneous admission of evidence that was relevant only to the punishment allegation and remanded for possible retrial on that allegation only. On remand, a second jury trial was held, and the second jury found true the charged variants of the subdivision (b)(6) punishment allegation. Defendant's original prison sentence was reimposed. In this appeal, defendant contends that the second trial court prejudicially erred in (1) failing to give a unanimity instruction and (2) permitting a retrial of the subdivision (b)(6) allegation on the charged variants. We reject his contentions and affirm the judgment.

I. Evidence At Retrial

Only two witnesses testified at the retrial. One witness, the Department of Justice's custodian of records, testified that defendant was not the registered owner of any firearms. The other witness, Deputy John Etheridge, testified about the circumstances of defendant's possession of a concealed firearm in a vehicle.

Shortly before 10:00 p.m. on April 17, 2009, Etheridge was on patrol on a desolate highway just outside of Watsonville. He saw a vehicle drive off the highway onto the shoulder. Concerned that something might be wrong with the vehicle, he pulled up near it. Etheridge could not see well enough so he drove up the highway a little ways, made a u-turn, and came back to the stopped vehicle. When he returned, he stepped out of his patrol car and saw three men near a Honda. Etheridge had his spotlight on, and he could see that defendant and Adrian Sanchez were near the rear of the Honda. Juan Ultreras was by himself a few feet from the passenger's side of the Honda. Etheridge could see the faces of Ultreras and Adrian Sanchez, and they "looked tense."

Etheridge said: "'Hey, Sheriff's Office. What's going on?'" Defendant, who was facing away from Etheridge, "made a motion like he was tucking something into his waistband." Ultreras, who "looked really scared," walked toward Etheridge's patrol car. Defendant and Adrian Sanchez "waved" at Ultreras and walked back toward the Honda.

Etheridge yelled at them to "stop" and "[g]et on the ground." Ultreras got on the ground. Adrian Sanchez took something out of his pocket and threw it in the back seat of the Honda, and he put his hands on the roof of the Honda.

Defendant ignored Etheridge's commands and got into the driver's seat of the Honda through the driver's side door. Etheridge did not see anything in defendant's hands before defendant got into the Honda. Etheridge then saw defendant "moving around a lot, like bending over in his seat." He could not see what defendant was doing with his hands, but "[i]t looked like he was hiding or getting something." Defendant was "hunched over, shoulders moving back and forth, up and down as if he was trying to grab something or hide something where he was seated."

Etheridge yelled at defendant to get out of the Honda. Defendant waited a few seconds and then got out of the Honda and walked toward the back of the Honda. After a few seconds, defendant walked back toward the driver's side door of the Honda. Etheridge again yelled at him and ordered him to "get on the ground," but defendant got back into the Honda's driver's seat and "did that same motion again . . . ." He again got out of the Honda, and this time he had his vehicle registration in his hands. Etheridge again commanded defendant to "[g]et on the ground," and defendant eventually did so. Both defendant and Adrian Sanchez got on the ground near the rear of the Honda.

Once backup arrived, Etheridge looked under the driver's seat of the Honda and saw revolver bullets and a revolver. The handle or grip of the revolver was facing toward the front of the Honda and sticking out about half an inch from under the driver's seat so that it was "very visible." Bullets also were lying on the driver's side floorboard. Etheridge photographed the revolver and bullets before touching them and removing them from the Honda, and the photographs were admitted into evidence at trial. The revolver was fully loaded.

II. Procedural Background

Defendant was charged by amended information with carrying a concealed firearm in a vehicle, and bringing a controlled substance into a jail.[2] The amended information further alleged as to the firearm count that "the firearm and unexpended ammunition were in the immediate possession of, and readily accessible to, the Defendant and that the firearm was not registered to the Defendant."[3]

At the first jury trial, shortly before the instruction conference, the following colloquy occurred outside the presence of the jury. "[THE COURT:] Here are some of the problems: I think we need clarification to make sure that this is a felony, that is a loaded gun, so that we don't end up having the jury, unless you want to, convict of a misdemeanor after all of this as to the 12025 and the basis as you set forth in your Information was that the firearm and unexpended ammunition were in the immediate possession of and readily accessible to the defendant and that the firearm was not registered to the defendant. Evidence seems to support that if the firearm was loaded, which is a little bit different than what you've got in the Information here -- [¶] MR. BAUM [the prosecutor]: Uh-huh. [¶] THE COURT: -- and that it was not registered to the defendant, but I will leave that up to you. [¶] MR. BAUM: I can tailor the instruction, Your Honor, and I'll send the Court and counsel copies. [¶] THE COURT: I think we need to tailor the verdict form, too. Do you want those verdicts back or do you have them? [¶] MR. BAUM: Is that the only change the Court contemplated and the defense contemplated? [¶] THE COURT: That's the only thing I focussed [*sic*] on so

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[2] He was also charged with actively participating in a criminal street gang (§ 186.22, subd. (a)), and the firearm count was the subject of a gang enhancement allegation (§ 186.22, subd. (b)(1)). In addition, the amended information alleged that defendant had suffered a prior juvenile adjudication that qualified as a strike (§ 667, subds. (b)-(i)).

[3] The original information contained the same allegation.

far because I'm having difficulty trying to understand your position on this and so I think that's the only thing." There was no further discussion of this issue at the first trial's instruction conference.

The jury in the first trial was instructed that an element of the carrying a concealed firearm in a vehicle count was that the "firearm was substantially concealed within the vehicle." The instruction on that count also stated "a firearm is loaded if there is an unexpended cartridge or shell in the firing chamber." The jury received *no further instructions* on the subdivision (b)(6) allegation.

The prosecutor argued to the first jury that "the defendant was found to have a loaded, unregistered 357 magnum revolver under the front seat of his car." He told the jury that "we have two additional findings you may make in this case and should make in this case: That the gun was loaded and that it was not registered to the defendant." "The special allegations: That the gun was loaded and that it wasn't registered to the defendant. You have abundant evidence of that. There's the picture right there; the 357 magnum revolver, six rounds in the cylinder, ready to go." Defendant's trial counsel argued that defendant did not know that the gun was in the Honda. The prosecutor responded: "[T]here is no such thing as a 357 magnum fairy who goes around leaving guns underneath the seats of people's cars."

The first jury was given a verdict form that asked it to find true or not true "that the firearm was loaded" and to find true or not true "that the defendant was not listed with the California Department of Justice as the registered owner of the firearm." The first jury found these allegations true.

In defendant's first appeal, this court found that the first trial court had erred in admitting into evidence an exhibit that was the only evidence that defendant was not the registered owner of the firearm. The judgment was reversed, and the matter was remanded with directions to either retry the subdivision (b)(6) allegation or reduce the former section 12025 count to a misdemeanor and resentence defendant.

At the second jury trial, the prosecutor told the jury in his opening statement that the jury was to determine: "was the firearm and the ammunition for it either in his immediate possession or readily accessible to him." "[T]he gun was either on his person in his waistband . . . or it was immediately accessible to him because it was underneath the driver's seat, butt end facing out. Either way, this defendant is guilty of the special allegation against him."

Defendant presented no evidence at the second trial. The jury was instructed: "It has already been determined and you must assume that the defendant possessed the firearm in this case." The jury was asked to resolve only the allegation "that the defendant was not the registered owner of the firearm and the defendant possessed the firearm with ammunition." "To prove this allegation the People must prove that; one, the defendant is not listed with the Department of Justice as the registered owner of the firearm, and; two, the firearm and unexpended ammunition capable of being discharged from that firearm were either in the defendant's immediate possession or readily accessible to him." The jury was also instructed: "Your verdict on the allegation must be unanimous. This means that to return a verdict all of you must agree to it."

The prosecutor argued to the jury that the "only question for you in this part was was the gun and ammunition for it in his immediate possession or . . . readily accessible. You can find him guilty based on either. There is strong evidence the gun was in his immediate possession. Evidence beyond a reasonable doubt." "What was he doing the first time [he got back in the Honda]? He was getting that gun out of his waistband, off his person and doing his best to hide it underneath the seat. That gun and the ammunition in it were in the defendant's immediate possession. [¶] Even if you don't agree with that theory, was the gun readily accessible? Of course it was. That gun, even if we assume it wasn't in the defendant's waistband, it wasn't in his immediate possession, it was certainly readily accessible. There's the front seat of his car, the seat he sat down in twice. The handle was sticking out just a little bit. All he had to do when he was sitting

in that seat was reach down and grab it. That gun was loaded and ready to go with six rounds of .357 ammunition. The gun was immediately accessible. . . . So there can be no reasonable doubt that both the firearm and the ammo were in the immediate possession in his waistband or at least that they were readily accessible when the gun was underneath the seat."

Defendant's trial counsel argued that there was some doubt about whether defendant had had the revolver in his waistband because Etheridge had not actually seen the gun outside the Honda. "So here's the thing about readily accessible. You're not going to get a definition of readily accessible. You have to kind of use your common sense." "Well, the only thing we really know is that when the officer saw it it was underneath the seat. This idea that somehow it was in his pants beforehand, you may think, well, maybe. You may think even probably. But there's no way -- no way that they proved that beyond a reasonable doubt. [¶] So the gun is underneath the seat. Is it readily accessible? . . . It certainly wasn't readily accessible when Mr. Sanchez was outside the car standing there. No, it's not readily accessible. Is it readily accessible when he's sitting in the driver's seat?" "Do we know in this case whether this gun could have come out easily?"

The prosecutor argued in rebuttal that the photographs showed the butt of the gun "is extending beyond the bottom of the seat" so it was "readily accessible." "It's under the seat with the handle sticking out ready to be grabbed, ready to be fired."

During deliberations, the jury asked for Etheridge's testimony related to the photographs of the gun under the Honda's driver's seat and a "more detailed definition of 'readily accessible.'" The court gave the jury Etheridge's testimony about the photos, and it provided the following definitions in writing: "READILY: quickly and easily [¶] ACCESSIBLE: able to be reached or approached."[4] The jury then quickly reached a

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[4] Defendant's trial counsel objected to these definitions.

verdict finding the allegation true. The court reimposed the original sentence, and defendant timely filed a notice of appeal.

III. Discussion

A. Unanimity

Defendant contends that the trial court prejudicially erred in failing to give a unanimity instruction because, in his view, some jurors could have based their true finding on his "immediate possession" of the gun in his waistband when he was "outside the vehicle" while other jurors based their true finding on his ready access to the gun when he was "inside the vehicle" and the gun and ammunition were under the Honda's driver's seat.

There was no need for a unanimity instruction in this case. "A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." (*People v. Maury* (2003) 30 Cal.4th 342, 423.) First of all, it is important to remember that the jury was deciding only the punishment allegation that was attached to defendant's conviction for carrying a concealed firearm *in a vehicle* in violation of former section 12025. "A person is guilty of carrying a concealed firearm when he or she does any of the following: [¶] (1) *Carries concealed within any vehicle* which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person." (Former § 12025, subd. (a); Stats. 1999, ch. 571, § 2, p. 3961.) The provisions governing the punishment for a violation of former section 12025, subdivision (a) were contained in subdivision (b), which provided: "Carrying a concealed firearm in violation of this section is punishable, as follows." Only subdivision (b)(6) was at issue in this case. It provided that a violation of former section 12025, subdivision (a) was punishable as a wobbler "if both of the following conditions are met." The two conditions that followed were: "(A) Both the . . . revolver . . . and the unexpended ammunition capable of being

discharged from that firearm are either in the immediate possession of the person or readily accessible to that person, or the . . . revolver . . . is loaded as defined in subdivision (g) of Section 12031. [¶] (B) The person is not listed with the Department of Justice . . . as the registered owner of that [firearm]." (Stats. 1999, ch. 571, § 2, p. 3962.) Consequently, the only issue before the jury concerning defendant's immediate possession or ready access to the firearm concerned defendant's access to the firearm while it was concealed *inside the Honda*.

Despite defendant's claim to the contrary, the prosecutor did not argue that the allegation could be found true based on defendant's possession of the gun in his waistband *outside the Honda*. The prosecutor presented two theories to the jury. One of his theories was that the gun and its ammunition "were in the defendant's immediate possession" when "[h]e was getting that gun out of his waistband, off his person and doing his best to hide it underneath the seat." Defendant was plainly inside the Honda when he was "hid[ing] it underneath the seat." The prosecutor's other theory was that, even if the gun was never in defendant's waistband, the gun and its ammunition were "readily accessible" to defendant when he was sitting in the Honda's driver's seat.

Both of the prosecutor's theories were based on defendant's possession of or ready access to the firearm *when he was sitting in the Honda's driver's seat*. While some jurors could have believed that the allegation was true because defendant had possession of the firearm in his waistband when he sat in the Honda's driver's seat, it is not possible that those same jurors could have failed to believe that defendant had ready access to the firearm since they would have necessarily had to find that defendant also moved the firearm from his waistband to under the driver's seat. After all, if the gun was originally in defendant's waistband, the only way the gun could have gotten from defendant's waistband to under the seat was by defendant putting it there while he sat in the driver's seat. And it is inconceivable that he could have put it there without having had ready access to the area under the seat where he placed it when he did so. The only other

theory that could have supported a true finding was that defendant had ready access to the gun when he sat in the Honda's driver's seat with the firearm under the seat. Under both theories, the jurors necessarily found that defendant had ready access to the gun under the seat even if some of the jurors did not also believe that he had the gun in his immediate possession in his waistband while he sat in the driver's seat.

B. Multiple Prosecution

Defendant argues that section 654 precluded the prosecution from trying him at the second trial on the *charged* variants of the subdivision (b)(6) allegation since, at the first trial, the first jury had found true an *uncharged* variant of the subdivision (b)(6) allegation.

A violation of former section 12025, subdivision (a) is punishable as a wobbler under subdivision (b)(6) "if both of the following conditions are met." The two conditions are: "(A) Both the . . . revolver . . . and the unexpended ammunition capable of being discharged from that firearm are either in the immediate possession of the person or readily accessible to that person, or the . . . revolver . . . is loaded as defined in subdivision (g) of Section 12031. [¶] (B) The person is not listed with the Department of Justice . . . as the registered owner of that [firearm]." (Stats. 1999, ch. 571, § 2, p. 3962.) Thus, there are three ways to satisfy the first "condition." The prosecution may satisfy this condition by proving: (1) the firearm is loaded; (2) the firearm and its ammunition are in the immediate possession of the person; *or* (3) the firearm and its ammunition are readily accessible to the person. The amended information alleged only two of these three ways of satisfying the first condition. It alleged that "the firearm and unexpended ammunition were in the immediate possession of, and readily accessible to, the Defendant and that the firearm was not registered to the Defendant." It did not allege that the firearm was "loaded." Nevertheless, at the first trial, the jury was asked to and did find true "that the firearm was loaded." At the second trial, the prosecutor (the same

prosecutor as at the first trial) did not ask the jury to find true that the firearm was loaded but instead proceeded on the subdivision (b)(6) allegation as it had been charged in the amended information. The second jury returned a verdict finding the charged allegation true.

Defendant claims that the first jury's verdict "impliedly acquitted" him of the charged allegation so he could not be tried on that allegation at the second trial. Section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).)

Defendant relies on the last sentence of section 654, but it has no facial application here. Defendant was not "acquitted" of the subdivision (b)(6) allegation at the first trial and, because of this court's reversal and remand, he had not suffered a "conviction and sentence" based on that allegation when he was tried at the second trial.

Nor do any of the cases upon which defendant relies address a situation similar or analogous to the one before us. The seminal case on section 654's multiple prosecution prohibition is *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*). In *Kellett*, the California Supreme Court explained that "Section 654's preclusion of multiple prosecution is separate and distinct from its preclusion of multiple punishment. The rule against multiple prosecutions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed; double prosecution may be precluded even when double punishment is permissible." (*Kellett*, at p. 825.) The purpose of the multiple prosecution bar is to prevent "successive prosecutions for closely related crimes." (*Kellett*, at p. 826.) "When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless

joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Kellett*, at p. 827.)

Kellett is inapplicable here. The prosecution's pursuit of a true finding on the subdivision (b)(6) allegation at the second trial was not a "subsequent prosecution" after defendant had been acquitted or convicted and sentenced for the true finding at the first trial on the subdivision (b)(6) allegation. The true finding in the first trial was vacated due to this court's reversal and remand as a result of defendant's first appeal, and the true finding in the second trial occurred in the same "single proceeding" not a subsequent one.

In *Sanders v. Superior Court* (1999) 76 Cal.App.4th 609 (*Sanders*), Sanders was originally convicted of 10 counts of grand theft. (*Sanders*, at p. 612.) On appeal, the judgment was reversed due to insufficiency of the evidence. (*Sanders*, at pp. 613-614.) After remittitur had issued, the prosecution initiated a second prosecution of Sanders based on the same facts for 10 counts of forgery and 10 counts of presenting a false or forged document for recording. (*Sanders*, at pp. 612, 615.) Sanders contended that the second prosecution was barred by section 654's multiple prosecution bar, and the Court of Appeal agreed. (*Sanders*, at p. 615.) Like *Kellett*, *Sanders* involved two separate, successive prosecutions for offenses based on the same facts. We do not confront that situation here because there were not two separate, successive prosecutions.

In re Johnny V. (1978) 85 Cal.App.3d 120 (*Johnny V.*) was a case in which juvenile petitions alleged that two juveniles had committed a murder. After a jurisdictional hearing, the juvenile court found that they had committed the uncharged offense of aggravated assault. (*Johnny V.*, at pp. 123-124.) On appeal, the juveniles contended that the juvenile court lacked the power to find that they had committed aggravated assault because it was not a lesser included offense of murder. (*Johnny V.*, at pp. 134-135.) The juveniles had objected below to the juvenile court's finding, thereby preserving their due process notice contention for appeal. (*Johnny V.*, at p. 137.) The

Court of Appeal found that due process precluded the juvenile court from finding that the juveniles had committed aggravated assault because that offense was not a lesser included offense of murder. (*Johnny V.*, at pp. 135-136.) The Court of Appeal also found that the juveniles could not be subjected to a further prosecution arising out of the incident. It held that the juvenile court's invalid finding that the juveniles had committed aggravated assault "also constituted a finding that the minors had not committed the offense of murder—in essence an acquittal of the murder charge." (*Johnny V.*, at p. 142.) Since they had been acquitted of the murder count, section 654 barred subsequent prosecution for the offense. (*Johnny V.*, at p. 142.)

Johnny V. is not applicable to the facts before us. Here, the first jury's true finding on the uncharged variant of the subdivision (b)(6) allegation was not a due process violation and did not constitute an acquittal of the charged variants of the subdivision (b)(6) allegation. Defendant's trial counsel did not object at the first trial to the prosecutor's presentation of the uncharged variant, so there was no due process violation as there was in *Johnny V.* The prosecutor did not seek a finding on the charged variants of the allegation in the first trial and the charged variants were not presented to the first jury. The uncharged variant of the allegation was not a lesser allegation than the charged variants of the allegation. These variants simply represented alternative means of proving the allegation. Hence, the first jury's finding did not constitute an acquittal, implied or otherwise, of the charged variants of the allegation.

Defendant's reliance on *Barriga v. Superior Court* (2012) 206 Cal.App.4th 739 (*Barriga*) is also misplaced. In *Barriga*, a juvenile was arrested in connection with a carjacking incident. However, he was not alleged in juvenile court to have committed carjacking but instead was alleged to have committed driving or taking a vehicle, resisting a peace officer, and other unrelated offenses. (*Barriga*, at p. 741.) The juvenile entered into a plea agreement under which he admitted the resisting count and one of the unrelated counts in exchange for the dismissal of the remaining counts. He was

subsequently charged in criminal court with carjacking based on the same incident, and he claimed that section 654 precluded this subsequent prosecution. (*Barriga*, at pp. 742-743.) The Court of Appeal agreed. (*Barriga*, at p. 745.) The only serious question in *Barriga* was whether the subsequent prosecution fell within an exception to section 654 that applies where the additional facts necessary to bring the subsequent prosecution had not been discovered at the time of the first prosecution despite the exercise of due diligence. (*Barriga*, at pp. 746-747.) The Court of Appeal held that the prosecution had not exercised due diligence. (*Barriga*, at pp. 747-749.)

Unlike the situation in *Barriga*, this case does not involve two separate prosecutions being brought against a defendant. Defendant has been subjected to but a single prosecution as to the subdivision (b)(6) allegation. Two trials were held on that allegation because, as a result of defendant's appeal, the first jury's true finding was reversed due to evidentiary error. The second jury trial was a renewal of the original prosecution for the subdivision (b)(6) allegation, not a second prosecution for that allegation.

Although defendant was tried twice on the subdivision (b)(6) allegation, the second trial was a result of his appellate victory after the first trial on that allegation. The evidence at the first trial was sufficient to support the first jury's finding on the allegation, and the first jury was not asked to consider the charged variants so its true finding on the uncharged variant was not an implied acquittal of the charged variants. Section 654 did not preclude the prosecution from proceeding on the charged variants at the second trial.

IV. Disposition

The judgment is affirmed.

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Mihara, Acting P. J.

WE CONCUR:

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Márquez, J.

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Grover, J.